1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	UNITED STATES, :
4	Petitioner : No. 12-1408
5	v. :
6	QUALITY STORES, INC., ET AL. :
7	x
8	Washington, D.C.
9	Tuesday, January 14, 2014
10	
11	The above-entitled matter came on for ora
12	argument before the Supreme Court of the United States
13	at 1:00 p.m.
14	APPEARANCES:
15	ERIC J. FEIGIN, ESQ., Assistant to the Solicitor
16	General, Department of Justice, Washington, D.C.; on
17	behalf of Petitioner.
18	ROBERT S. HERTZBERG, ESQ., Southfield, Michigan; on
19	behalf of Respondents.
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1	PROCEEDINGS
2	(1:00 p.m.)
3	CHIEF JUSTICE ROBERTS: We will hear
4	argument next in Case 12-1408, United States v. Quality
5	Stores.
6	Mr. Feigin.
7	ORAL ARGUMENT OF ERIC J. FEIGIN
8	ON BEHALF OF THE PETITIONER
9	MR. FEIGIN: Thank you, Mr. Chief Justice,
10	and may it please the Court:
11	The payments in this case fall squarely
12	under FICA's definition of wages, which includes all
13	remuneration for employment. Consistent with the
14	purpose of FICA to fund the Social Security and Medicare
15	programs, this Court has construed the term "employment"
16	broadly to encompass the entire employer-employee
17	relationship. The payments here, which were paid only
18	to Respondent's employees and were keyed to the
19	employees' positions, salary levels, and length of
20	service, clearly were part of the employer-employee
21	relationship.
22	Two particular features of the statute, I
23	think, make especially clear that separation-related
24	payments like this are covered. First, the basic
25	definition of wages both historically and currently

- 1 has been subject to specific exclusions for certain
- 2 types of separation-related pay such as retirement pay.
- 3 Those exclusions would be unnecessary if the basic
- 4 definition of wages didn't cover separation-related
- 5 payments.
- 6 Second, one of the historical exclusions,
- 7 which was in the statute from 1939 to 1950, was for
- 8 certain types of dismissal payments. When Congress
- 9 eliminated the exception for certain types of dismissal
- 10 payments in 1950, the accompanying House report made
- 11 clear what would already have been in any event implicit
- in the repeal itself, which is that from that point
- 13 forward, all dismissal payments, which were -- Congress
- understood in the House report to include any payment on
- account of an employee's involuntary separation, would
- 16 be considered wages under FICA.
- 17 Respondent's reliance in this case on
- 18 Section 3402(o) is misplaced. Section 3402(o) is a
- 19 substantive rule of income tax withholding, but is
- 20 expressly limited in its effect to Chapter 24, which is
- the income tax withholding chapter, and related
- 22 procedural provisions. It has no bearing on the
- definition of wages for purposes of FICA. In any
- 24 event --
- JUSTICE GINSBURG: Well, don't we have a

- decision that says that the -- the term "wages" should
- 2 be interpreted the same way for FICA purposes and income
- 3 tax?
- 4 MR. FEIGIN: Well, two points about that,
- 5 Your Honor. First of all, nothing in this Court's
- 6 decision in Rowan suggests that this Court or any court
- 7 needs to look to substantive rules of income tax
- 8 withholding to determine the basic definition of wages
- 9 for purposes of FICA.
- I think it's clear from the preamble to
- 11 Section 3402(o) that Congress was focused on Chapter 24
- 12 and was trying to solve a specific problem within
- 13 Chapter 24, the income tax withholding chapter, and it
- didn't intend to send essentially shock waves through
- 15 the Internal Revenue Code that would affect the
- definition of wages in other chapters.
- 17 Second, Respondent's view, I think, would
- undercut the basic principle animating Rowan, which is
- 19 the idea that the definitions of wages should be
- 20 congruent for purposes of administrability.
- 21 Respondent's reading, which would say that none of the
- payments specified in Section 3402(o)(2)(a) can possibly
- 23 be considered wages for FICA purposes, but nevertheless
- 24 must be treated as wages for withholding purposes, would
- 25 require employers to keep separate track of wages for

- 1 the two different purposes and report them separately
- when they do W-2 forms for the employees or their own
- 3 941 tax returns.
- 4 Now, Respondents have conceded that Section
- 5 3402(o) did not modify the preexisting definition of
- 6 "wages" under either FICA or the income tax withholding
- 7 chapter. Instead, their argument seems to be that the
- 8 definition of "wages" in FICA, even before Section
- 9 3402(o) was enacted, contained a hole precisely the size
- and shape of the definition of supplemental unemployment
- 11 compensation benefits that Congress later codified in
- 12 Section 3402(o)(2)(a).
- Now, they haven't pointed to a single
- 14 statutory provision, regulation, or revenue ruling that
- would have given Congress that view. There is simply no
- 16 reason to believe that that hole existed before the
- enactment of Section 3402(o) and its common ground that
- it doesn't exist after Section 3402(o).
- 19 It's also important to understand why
- 20 Congress enacted Section 3402(o). Congress enacted
- 21 Section 3402(o) in response to a suggestion by the
- Treasury Department in 1969 that there was a problem
- with supplemental unemployment benefit payments.
- "Supplemental unemployment benefit payments" was a term
- 25 that the IRS itself had used in a series of revenue

- 1 rulings that considered certain payments by employers
- 2 that were intended to supplement State unemployment
- 3 compensation benefits, and the IRS in those rulings had
- 4 determined that those benefits were not wages.
- Now, the IRS in 1969 informed Congress that
- 6 because these benefits were considered non-wages, it was
- 7 creating a problem, namely, that income taxes weren't
- 8 being withheld and the recipients of the payments were
- 9 receiving large income tax bills at the end of the year.
- 10 Congress enacted Section 3402(o) to address
- 11 that specific problem. It did not intend to modify the
- 12 definition of wages. It -- nothing in the Section
- 13 3402(o) can be taken as a commentary on the definition
- of wages that was enacted --
- JUSTICE KENNEDY: Either then or now, were
- the supplemental unemployment benefit payments subject
- to FICA withholding or are they now exempt under the
- 18 present --
- 19 MR. FEIGIN: So supplemental unemployment
- 20 benefits, as defined by the IRS in its revenue rulings,
- 21 were subject neither to withholding nor to taxation
- 22 under FICA.
- JUSTICE KENNEDY: And after (o) was passed?
- MR. FEIGIN: After (o) was passed, those
- 25 wages --

- 1 JUSTICE KENNEDY: It's obviously subject to
- Federal income tax withholding. What about FICA?
- 3 MR. FEIGIN: They still were not subject to
- 4 FICA tax.
- 5 JUSTICE KENNEDY: Okay. And is that still
- 6 true now?
- 7 MR. FEIGIN: That's still true now under the
- 8 current revenue ruling, Your Honor.
- 9 CHIEF JUSTICE ROBERTS: Why -- I might have
- 10 missed a step here. Why were they getting big tax bills
- if they're not wages?
- MR. FEIGIN: Well, they were still
- 13 considered to be income under the revenue rulings. So
- 14 the effect of that was that they were receiving
- pavements during the year that were considered income
- and as to which they would owe income tax, but the
- income tax wasn't being regularly withheld as -- as it
- is supposed to be on wages, and therefore at the end of
- 19 the year, they'd receive a large income tax bill for
- those payments.
- If the Court has no further questions, I'll
- 22 reserve the balance --
- JUSTICE GINSBURG: I have a question about
- the effect of the government's position. In the States,
- 25 if these -- if we say these benefits qualify as wages

- 1 for FICA purposes, then what about the States that say
- 2 we supply unemployment compensation only if there is not
- 3 another source of unemployment compensation?
- 4 MR. FEIGIN: Your Honor, if the Court adopts
- 5 the government's position in this case, there's not
- 6 going to be any change in the States because the
- 7 government's position is the status quo.
- Now, there are certain States that do look
- 9 to the Federal definition of "wages" in order to
- 10 determine whether an individual qualifies for
- 11 unemployment benefits under State law. And if the Court
- were to reach some other conclusion in this case than
- 13 the one the -- the government is urging, it is possible
- 14 that there could be some effect in those States on
- 15 qualification for State unemployment benefits. But
- 16 since State unemployment benefit qualification is
- 17 largely a matter of State law, the States could adjust
- 18 to that however they saw fit.
- 19 JUSTICE KENNEDY: Is it ever to the
- long-term advantage to the employee to have FICA
- withholding, so that the employee's account is greater
- 22 and the benefits are greater?
- MR. FEIGIN: So for -- certain employees may
- 24 want that -- certain payments to count as wages because
- 25 the definition of "wages" for FICA purposes is identical

- 1 to the definition of "wages" under the Social Security
- 2 Act. And under the Social Security Act, the accrual of
- 3 benefits is based on -- on wages. So some employees may
- 4 want to have earned more wages.
- 5 However, in this case, they're not making
- 6 that argument. They're simply arguing that they
- 7 shouldn't have to pay taxes on these payments which were
- 8 made, again, only to employees, were keyed to the
- 9 employees' positions, salaries and length of service and
- 10 clearly meet FICA's definition of "wages."
- If the Court has no further questions,
- 12 I'll --
- JUSTICE ALITO: What if the payments were
- 14 not keyed to the length of service and to salary? It
- was just a flat severance payment.
- 16 MR. FEIGIN: We still think that would meet
- the basic definition of "wages" under FICA, Your Honor,
- 18 and would still count as wages and be taxable under
- 19 FICA. I think this case is even easier than that
- 20 because the payments were clearly keyed to critical
- 21 aspects of the employment relationship.
- Indeed, in the case of the post-petition
- 23 payments, the payments were expressly conditioned on the
- employee's willingness to remain performing services for
- 25 Respondents during the pendency of the bankruptcy

- 1 proceedings.
- JUSTICE ALITO: Well, in the Coffy case, the
- 3 Court drew a distinction between compensation for
- 4 services and payments that are contingent on the
- 5 employee's being thrown out of work. But that -- why
- 6 doesn't that apply here?
- 7 MR. FEIGIN: So Coffy was addressing not
- 8 FICA, but a statute that dealt with veterans' rights
- 9 returning to work after a period of military service.
- 10 As construed by this Court, that statute drew a
- 11 distinction between a reward for length of service, to
- which the returning veteran was entitled, and short-term
- 13 compensation for services rendered to which the
- 14 returning benefit -- returning veteran -- excuse me --
- was not entitled.
- Now, that distinction doesn't exist under
- 17 FICA. Even if a particular payment is considered a
- 18 reward for length of service, as this Court held that
- the payments in Coffy were, it would still be
- 20 remuneration for services under FICA's definition of
- 21 wages.
- For example, if you were to give an employee
- 23 an award after 20 years of service, that would clearly
- be a reward for length of service and would qualify as
- such under Coffy, but would not be remuneration for

- 1 employment.
- Now, the specific question you asked,
- 3 Justice Alito, about the difference between payments
- 4 that are part of the continuing employment and payments
- 5 that occur at the end of the employment relationship, is
- 6 also not a distinction that FICA draws. As I said
- 7 earlier, there are a number of historical and current
- 8 exclusions for certain types of payments that are
- 9 triggered by the end of the employment relationship.
- 10 For example, from 1954 to 1983 the statute expressly
- 11 excluded retirement pay. I don't think there is a
- reasonable reading of the basic definition of "wages"
- under FICA that would include retirement pay but exclude
- 14 severance payments.
- And again, I think it's very pertinent here,
- and probably the best piece of evidence we have in this
- case about congressional intent, that Congress from 1939
- to 1950 excluded from the basic definition of "wages" in
- 19 FICA certain types of dismissal payments, by which it
- 20 meant payments on account of involuntary separation; and
- 21 then it eliminated that exclusion in 1950, making clear
- both as a statutory matter and it's clear in the
- 23 legislative history that such payments, that is payments
- on account of involuntary separation, would from that
- point forward be covered as wages under FICA.

- If the Court has no further questions, I
- 2 will reserve my time.
- 3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 4 Mr. Hertzberg.
- ORAL ARGUMENT OF ROBERT S. HERTZBERG
- 6 ON BEHALF OF THE RESPONDENTS
- 7 MR. HERTZBERG: Mr. Chief Justice, and may
- 8 it please the Court:
- 9 The Government -- the Government agrees that
- some SUB payments are not wages. Where the dispute lies
- 11 is what SUB payments are covered by FICA and which are
- 12 not. If the payments meet the definition of SUB payment
- under the statute, then they are not wages and not
- 14 subject to FICA. The Government's --
- JUSTICE SCALIA: What are you saying, "SUB
- 16 payments"?
- MR. HERTZBERG: Supplemental unemployment
- 18 benefits.
- JUSTICE SCALIA: I'm not hip.
- MR. HERTZBERG: The Government says they are
- 21 now wages if they meet the definition as they
- 22 particularly see it in a particular revenue ruling that
- they issue at some point in time; and that's where the
- 24 dispute lies.
- It is our position that SUB payments is not

- 1 remuneration for services because it is contingent, as
- 2 indicated previously on the Coffy case, upon losing your
- 3 job.
- 4 There is a problem on the public policy
- issue that the Government is telling the Court today,
- 6 and the problem is if what they say is SUB pay is tied
- 7 to State unemployment benefits, then it is not wages and
- 8 subject to FICA. They say if it's -- if you receive
- 9 supplemental unemployment benefits but you do not
- 10 receive State unemployment, then it is subject to FICA
- 11 taxes and is wages.
- 12 So, what they are saying to the Court is if
- 13 you have the ability to receive both the supplemental
- 14 unemployment benefits and the State unemployment
- benefits, then we are not going to tax you with FICA
- taxes, but if you only receive less, being just the
- supplemental unemployment benefits, then it is going to
- 18 be wages and then it's going to be subject to FICA
- 19 taxes.
- JUSTICE SOTOMAYOR: Can you win at all if I
- 21 think their regulation is irrational and contrary to the
- 22 statute?
- MR. HERTZBERG: Yes.
- JUSTICE SOTOMAYOR: I know that's not before
- 25 us, but --

- 1 MR. HERTZBERG: Yes.
- JUSTICE SOTOMAYOR: -- how do you win,
- 3 assuming I just say I don't pay any attention to the
- 4 regulation?
- 5 MR. HERTZBERG: Your Honor, it's our
- 6 position that the statute is clear. When you look at
- 7 the definition of "wages" under the FICA statute and the
- 8 withholding statute, they are almost identical. And if
- 9 you look at the Rowan case, the Rowan case says that you
- 10 should read the statutes consistently for ease of
- 11 administration. It is clear --
- JUSTICE SOTOMAYOR: Isn't it easier to
- 13 withhold taxes on both?
- MR. HERTZBERG: Pardon me?
- JUSTICE SOTOMAYOR: Isn't it easier to
- 16 withhold taxes on both?
- MR. HERTZBERG: Well, what they are
- 18 withholding on the withholding is income taxes. They
- 19 are not withholding wages. And that's why -- because it
- doesn't fit the definition of wages. If you look at
- 3121, which is the FICA statute, supplemental
- 22 unemployment benefit is not remuneration for services.
- 23 They're only --
- JUSTICE GINSBURG: If it is treated for
- income tax purposes as wages, why shouldn't it be

- 1 treated for FICA tax purposes?
- 2 MR. HERTZBERG: Your Honor --
- JUSTICE GINSBURG: What your are saying is
- 4 on the income side they are treated as wages; on the
- 5 FICA side they're not treated as wages.
- 6 MR. HERTZBERG: Your Honor, supplemental
- 7 unemployment benefits are provided to an individual to
- 8 provide a safety net when they lose their job, to cover
- 9 them during the period while they seek new employment.
- 10 To then tax the individual with FICA taxes doesn't make
- 11 sense, because you are taking away the money that the
- individual needs as a safety net; and to take money away
- in order to provide for the funding of Medicare or
- 14 Social Security doesn't make sense.
- JUSTICE SCALIA: Why are they giving them
- the money, just out of love? I mean, they don't give it
- to me when I retire. They only give it to their
- 18 employees when they retire. What -- what are they
- 19 paying them for? Aren't they paying them for faithful
- and good past services?
- MR. HERTZBERG: No, what they're doing is
- 22 they're --
- JUSTICE SCALIA: No, they are -- they are
- just being generous?
- MR. HERTZBERG: They are putting in place a

- 1 plan in order to protect the employee in the event of a
- 2 layoff or a plant closing.
- JUSTICE SCALIA: Why don't they do that for
- 4 me?
- 5 MR. HERTZBERG: I don't know, Your Honor.
- 6 JUSTICE GINSBURG: There are some severance
- 7 payments that do count for FICA purposes, isn't that so?
- 8 MR. HERTZBERG: Your Honor, "severance" is a
- 9 generic term, but payments such as dismissal payments,
- some are treated as wages for FICA purposes; but we
- 11 believe the definition is different for supplemental
- 12 unemployment benefits. Under -- dismissal payments are
- 13 for involuntary termination. It can be because of a
- 14 firing or a cancellation of an employment contract,
- where supplemental unemployment benefits are based upon
- a plan and are given to an individual because of a plant
- 17 closing or a layoff.
- JUSTICE ALITO: What if Section 3402(o) did
- 19 not exist? Would these severance payments fall within
- 20 FICA's definition of wages then?
- MR. HERTZBERG: No. And the --
- JUSTICE ALITO: And why not?
- MR. HERTZBERG: The reason is that because,
- if you look at how they are treated, even the Government
- acknowledges that some supplemental unemployment

- 1 benefits are now wages. And if you look as far back as
- 2 1960, when 501(c)(17) was enacted dealing with trusts
- 3 and their exemption from the taxes, the definition of
- 4 "supplemental unemployment benefits" has always had its
- own definition. And it's always been treated -- in
- 6 1977, for example, the revenue ruling that the
- 7 Government issued said that supplemental unemployment
- 8 benefits of any kind are not -- are not -- wages and
- 9 subject to FICA.
- In 1986 Congress reenacted the withholding
- 11 statute and the FICA statute with the knowledge that
- 12 1977 revenue ruling was in place; and therefore, it's
- presumed that FICA taxes are not -- or that supplemental
- unemployment benefits are not subject to FICA taxes.
- The Government has stipulated that the
- 16 payments made in this case to the Quality Stores
- employees met the definition of supplemental
- unemployment benefits. And as I began to indicate, the
- 19 Rowan case said that you should read statutes
- 20 consistently and for ease of administration. When you
- look at 3121, being the FICA statute, along with 3401,
- the definition of "wages" is almost identical.
- JUSTICE BREYER: It is, but it -- really, if
- you have anything -- the definition is very broad. I
- mean, it says "'wages' means all remuneration for

- 1 employment." All remuneration -- wages means all
- 2 remuneration for employment paid basically for any
- 3 service of whatever nature performed by an employee.
- Now, I agree with you that it's the same
- 5 definition for the withholding. But Congress, it passes
- 6 the withholding change with conflicting interpretations.
- 7 So it wouldn't be the first time that Congress passed a
- 8 statute to say: We don't care what the conflicting
- 9 interpretations are; ignoring that, you are going to
- 10 withhold this money, period. And it said, whether it's
- 11 other than wages or not.
- I grant you, they might have thought they
- 13 had to pass it, but so?
- MR. HERTZBERG: Well, if SUB --
- JUSTICE BREYER: We could also look at it as
- they didn't have to pass it. It was subject to
- withholding anyway.
- MR. HERTZBERG: If SUB pay was wages, there
- would have been no need to pass 3402.
- JUSTICE BREYER: Well, no, there would have
- 21 been a need, if different people think different things.
- 22 So you want to be sure.
- MR. HERTZBERG: Well --
- JUSTICE BREYER: I mean, Congress does that
- 25 quite a lot. It -- it -- on certain, different people

- tell them different things. They say, we don't care; do
- 2 it anyway. And that's what this statute basically says:
- 3 Withhold anyway.
- 4 MR. HERTZBERG: Well --
- 5 JUSTICE BREYER: And maybe -- could we say
- 6 that? Could we say, well, in our opinion you are right.
- 7 Both statutes cover supplemental unemployment benefits.
- 8 It's never come up in the other context since this
- 9 because Congress wanted to be sure it was withheld.
- MR. HERTZBERG: I don't think you can, based
- upon when you look at what the statute says, 3402(o).
- 12 It says that they should be treated as if they are
- 13 wages. If they were already wages, there would have
- been no necessity of treating them if they were wages.
- 15 If you also look at the title of the section, it says
- 16 "other than wages." It's clear that if it was wages,
- they wouldn't use the word "other than wages."
- And if you look at the legislative history
- 19 also, it says in three different places that they're not
- wages and also indicates it's not remuneration for
- 21 services.
- So the reason that 3402(o) was enacted was
- because of the 1968 Treasury regulation that had the
- 24 reporting of supplemental unemployment benefits on a
- 25 1099 form. That's clearly not a wage form. If it's

- 1 wages, you report on a W-2. So there would have been no
- 2 need for enactment of 3402(o) if they were already
- 3 wages.
- 4 JUSTICE GINSBURG: Could you review again,
- 5 what is -- what is the relevant distinction between
- 6 dismissal payments that are subject to FICA and payments
- 7 that are not?
- 8 MR. HERTZBERG: Your Honor, dismissal
- 9 payments are involuntary termination.
- JUSTICE GINSBURG: It has to be involuntary?
- MR. HERTZBERG: Yes. And there -- and that
- 12 also is the beginning part of when you look at SUB
- 13 payments.
- JUSTICE GINSBURG: And SUB payments are all
- voluntary?
- MR. HERTZBERG: All involuntary
- terminations. But that's where they differ at that
- 18 point.
- 19 JUSTICE GINSBURG: You -- well, you told me
- 20 that the dismissal payments are involuntary. How about
- the supplemental? Are they ever and always voluntary?
- MR. HERTZBERG: No, they're -- they're
- involuntary payments, also, or based upon involuntary
- termination. The difference is supplemental
- unemployment benefits are paid pursuant to a plan, and

- 1 they are also based upon a layoff or a plant closing.
- 2 And a dismissal payment, for example, which
- is a separate category, and treated separately in the
- 4 Treasury regulations, is an involuntary termination.
- 5 And that's where it ends. And it can be based upon a
- 6 loss of employment through a firing or a cancellation of
- 7 a contract.
- JUSTICE BREYER: I'll take it that you're
- 9 right, that Congress that passed the withholding statute
- 10 thought it fell outside of the definition of wages, but
- 11 they were wrong.
- Now, that wouldn't be the first time either.
- 13 So -- but Congress did think it. So what weight am I
- 14 supposed to give to what Congress thought then about
- what an earlier Congress, namely, the Congress that
- passed the wage definition in the withholding statute
- 17 thought?
- 18 MR. HERTZBERG: You should give it, Your
- 19 Honor, a lot of weight. And the reason you should is
- because in 1986, the withholding and the FICA statutes
- were reenacted in full, including 3402(o). And at that
- 22 point in time, there was a revenue ruling in place that
- 23 said that all supplemental unemployment benefits are not
- wages and not subject to FICA.
- 25 And under the legislative reenactment,

- 1 Congress would have been presumed to have been aware of
- 2 that revenue ruling that was in place.
- JUSTICE BREYER: Well, yes. But that was so
- 4 much the more so, you see? They had authority saying it
- 5 wasn't wages. That doesn't mean that authority was
- 6 correct. And -- and so that's why they passed the
- 7 statute.
- 8 MR. HERTZBERG: But what the important
- 9 aspect is, is that it's not remuneration for services.
- 10 In the Coffy case, which was not directly dealing with
- 11 whether it was remuneration or not, indicated that
- 12 supplemental unemployment benefits are given to an
- individual because of the loss of a job. And as I
- indicated in the -- even the government has indicated
- that some supplemental unemployment benefits are not
- wages and subject to FICA.
- Where we differ is, is that we say all of
- them are not wages and not subject to FICA. What the
- 19 government says is, no, we'll issue a revenue ruling and
- we flip flopped our position several times on the
- 21 different revenue rulings, but whatever revenue ruling
- 22 we happen to issue at this point in time will determine
- whether the supplemental unemployment benefits qualify
- as wages for FICA purposes or are not wages.
- It's our position that the statute is clear.

- 1 When you look at it, especially in light of 3402(o),
- 2 and -- because there would have been no reason for
- 3 enactment of that section if supplemental unemployment
- 4 benefits were wages already, because they would have
- 5 been subject to FICA.
- 6 JUSTICE ALITO: Well, the government
- 7 explains 3402(o) on the ground that there had been prior
- 8 admin -- IRS administrative decisions exempting certain
- 9 types of SUB payments from the definition of wages. And
- 10 that -- that can explain that language. The language
- 11 that they are -- that SUB payments are to be treated as
- 12 if they were wages doesn't necessarily mean that all of
- those SUB payments are not wages. It does necessarily
- mean that at least some of them -- or suggests at least
- some of them are not wages. So what's wrong with the
- 16 government's explanation of the language along those
- 17 lines?
- MR. HERTZBERG: Because I think the language
- 19 is clear. And the language is clear because it says --
- in the title, it says "other than wages." If any of
- them were wages, they wouldn't have used the word "other
- 22 than wages." But looking at the statute itself and
- using the traditional tools of statutory interpretation,
- it says in the statute that they are to be treated as if
- they were wages. If they were already wages, there'd

- 1 have been no need for the statute.
- 2 And the legislative history shows us what
- 3 Congress was thinking at that point in time, because it
- 4 says in three different places, these are not wages and
- 5 also it indicates it's not remuneration for services.
- 6 JUSTICE SCALIA: Was the earlier statute
- 7 definition of wages for tax purposes, was that reenacted
- 8 at the same time?
- 9 MR. HERTZBERG: Yes, in 1986.
- JUSTICE SCALIA: So you really have -- you
- 11 call into play the principle that you should interpret a
- 12 statute to make sense and not interpret any provision to
- be superfluous, right?
- MR. HERTZBERG: Correct, Your Honor.
- JUSTICE SCALIA: And you say that the
- 16 government's interpretation renders it superfluous.
- MR. HERTZBERG: Absolutely, Your Honor.
- JUSTICE SCALIA: We'll ask him about that.
- MR. HERTZBERG: Thank you.
- 20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- Mr. Feigin, 18 minutes.
- 22 REBUTTAL ARGUMENT OF ERIC J. FEIGIN
- ON BEHALF OF THE PETITIONER
- MR. FEIGIN: Thank you, Mr. Chief Justice,
- 25 and may it please the Court:

- I first want to address Justice Sotomayor's
- 2 question. Justice Sotomayor, if you believe that the
- 3 revenue rulings that the IRS has issued are irrational
- 4 or invalid, the only colorable reason for believing that
- 5 is because the payments that those revenue rulings
- 6 classify as non-wages are clearly wages under FICA's
- 7 basic definition.
- 8 And if you believe the revenue rulings are
- 9 invalid for that reason, then that is all the more
- 10 reason to rule for the government here, because
- 11 Respondent's position would create an even bigger hole
- in the statute that would classify even more payments as
- 13 non-wages and is even less consistent with the statute.
- JUSTICE SOTOMAYOR: You were touching at
- what I was thinking. Why don't you answer
- 16 Justice Scalia's point. Why is (o) not superfluous?
- MR. FEIGIN: So, Your Honor, we acknowledge
- that the revenue rulings are not consistent with the
- 19 statutory text of FICA. The revenue rulings accept
- 20 certain payments from classification as wages that the
- 21 plain text of FICA unambiguously classify as wages. The
- revenue rulings are a continuation of a practice that
- began in the 1950s and '60s, which was a somewhat more
- freewheeling time in the history of statutory
- interpretation. And to the extent the IRS would defend

- these in a case in which they're challenged in court, it
- 2 would not be because they're consistent with the text of
- 3 the statute, but simply because Congress has taken the
- 4 revenue rulings as a given and passed statutes that
- 5 effectively assumed that the revenue rulings are being
- 6 effective, as Justice Breyer pointed out.
- JUSTICE SCALIA: You have to acknowledge,
- 8 though, that if you read -- if you read the two sections
- 9 of the statute together, the one seems to be
- 10 unnecessary.
- MR. FEIGIN: Well, a couple points on that,
- 12 Your Honor.
- JUSTICE SCALIA: "Wages" means all
- 14 remuneration, including cash value of all remuneration,
- including benefits. And then (o) says "extension of
- withholding of certain payments other than wages. For
- purposes of this chapter, any supplemental and
- unemployment compensation benefit paid to an individual
- shall be treated as if it were a payment of wages,"
- 20 suggesting that it really isn't.
- MR. FEIGIN: Well, first, just to pick up on
- 22 the textual point --
- JUSTICE SCALIA: I mean, there would have
- been a way to fix the revenue rulings without doing it
- 25 this way. Couldn't they have done it some other way

- 1 without enacting a statute that contradicted itself?
- MR. FEIGIN: Well, first of all, Your Honor,
- 3 just to pick up on the textual point that Justice Alito,
- 4 I think, was adverting to earlier. Saying that
- 5 particular types of payments shall be treated as if they
- 6 were wages made during a payroll period doesn't mean
- 7 that it's categorically impossible for such payments to
- 8 have qualified as wages to begin with.
- 9 As Judge Bryson pointed out in the -- his
- opinion to the Federal Circuit in the CSX case, which is
- 11 cited in our briefs, if you were to say to treat all men
- 12 as if they were 6 feet tall, that wouldn't mean that no
- man could possibly be 6 feet tall.
- JUSTICE SCALIA: Yes, unless it was in a
- 15 section that said how to treat men who are not 6 feet
- 16 tall. The title of this section, "extension of
- withholding to certain payments other than wages."
- MR. FEIGIN: Well, your Honor, it says --
- 19 JUSTICE SCALIA: I mean, it -- it clearly
- 20 suggests that these are not wages.
- MR. FEIGIN: Well, first of all, Your Honor,
- 22 it says, "certain payments other than wages." Second, I
- would point you to the part where it says, "treated as
- wages for a payroll period."
- JUSTICE SCALIA: Right.

- 1 MR. FEIGIN: And that actually has some
- 2 significance in that it allows the employer to treat
- 3 these as wages paid during the employer's normal payroll
- 4 period, so the withholding can be performed in the same
- 5 way that the employee would have withheld for normal
- 6 payroll period payment and avoids the need to apply the
- 7 rules that would govern in circumstances where payments
- 8 are made outside of a payroll period.
- 9 And these are payments that could well have
- been made outside a normal payroll period, but this
- directs that they be treated as payments within a
- 12 payroll period.
- I would again point the Court back to the
- 14 historical reason why 3402(o) exists. It was enacted,
- as I discussed earlier, following a suggestion by the
- 16 Treasury Department that there was a particular problem
- with withholding that needed to be solved.
- Now, Justice Scalia, I suppose Congress
- 19 might have solved that problem in different ways, but I
- think what Congress did here is it simply tried to solve
- 21 the problem once and for all. It just declared that
- these payments should be treated as if they were wages
- 23 so that withholding would occur, thereby solving the
- 24 problem that the IRS identified. And it enacted a
- definition of supplemental unemployment compensation

- 1 benefits that everyone agrees is broader than the set of
- 2 payments that the revenue rulings up to that point had
- 3 accepted. And there are a couple of very good reasons
- 4 Congress would have done it that way.
- One is that, because of the IRS's
- 6 case-specific approach to each of its revenue rulings,
- 7 it would have been difficult, if not impossible, for
- 8 Congress to craft statutory language that precisely
- 9 captured the contours of the payments that the IRS
- 10 either was treating or might later treat as non-wages.
- 11 Second, again, the supplemental unemployment
- benefit plans that are evolved in the 1950s continued to
- 13 evolve and take different forms. And I think the IRS
- just wanted to hedge against the possibility -- excuse
- me. Congress wanted to hedge against the possibility
- that the IRS might later decide that a plan structured
- 17 slightly differently from any plan that it had
- 18 considered before should also be considered nonwages.
- 19 And there was absolutely no downside to
- 20 Congress writing the definition in 3402(o)(ii)(a) more
- 21 broadly than the IRS rulings had thus far had an
- 22 opportunity to construe.
- That's because, again as the Federal Circuit
- pointed out, there is no practical harm done if you
- 25 treat -- if you are instructed to treat a particular

- 1 payment as wages and that payment already is wages.
- Now, Your Honor, to your point about
- 3 surplusage, first of all, I don't think the canon
- 4 against surplusage would help you construe FICA here
- 5 because I think FICA is unambiguous. I do not think
- 6 there is any way to read the definition, "remuneration
- 7 for employment," considering that it clearly includes
- 8 separation-related payments, as somehow again having a
- 9 hole that is precisely the size and shape of Section
- 10 3402(o)(2)(a).
- In any event, the only way this would be
- 12 superfluous is if some court were to hold, on an issue
- 13 that is not presented to the Court in this case, that
- the IRS has absolutely no administrative authority to
- 15 craft administrative exceptions to the definition of
- wages for policy reasons, as it did in the revenue
- rulings that underlie the enactment of Section 3402(o)
- 18 here.
- 19 If a court were to reach that conclusion,
- then Section 3402(o) might not have any operative
- 21 effect. But Congress in 1969 clearly could not have
- 22 believed that the revenue rulings were ineffective or it
- 23 never would have enacted Section 3402(o) in the first
- 24 place. There's no other reason Congress could have
- 25 thought that certain types of supplemental unemployment

- benefits were excepted from the definition of "wages."
- 2 My friend on the other side mentioned these
- 3 1968 regulations. Those regulations only applied to
- 4 payments from trusts. They didn't apply to payments,
- 5 like the payments at issue in this case, that come
- 6 directly from the employer. Those regulations did not
- 7 purport to construe the definition of "wages" in either
- 8 FICA or the income tax withholding statutes. And in
- 9 fact, since 1957 there has been an income tax
- withholding regulation that specifically says that any
- 11 payment on account of an employee's involuntary
- 12 separation does constitute wages for withholding
- 13 purposes. And Congress was presumably aware of that
- 14 regulation.
- And again, I would just like to address one
- 16 final point. I think opposing counsel's argument about
- this 1986 reenactment doesn't make a great deal of
- 18 sense. I think the argument is that when Congress
- 19 reenacted the statute in 1986 it was somehow adopting
- the then-current interpretation of the IRS in a 1977
- 21 revenue ruling.
- 22 I don't think that the enactment of Section
- 23 3402(o) originally in 1969 can be taken to have left the
- 24 IRS with sufficient flexibility to change its practices
- during the 1970s, but that the reenactment of that very

- 1 same language in 1986 would be taken to freeze for all
- 2 time and -- the current IRS practices and foreclose the
- 3 IRS from ever modifying those practices in the future.
- 4 Finally, Respondents point to the
- 5 legislative history of 3402(o), which does contain some
- 6 statements that supplemental unemployment compensation
- 7 benefits aren't wages. I think some of the reason for
- 8 that legislative history is confusion about the
- 9 nomenclature. There were "supplemental unemployment
- 10 compensation benefits, "which was a statutory term, and
- "supplemental unemployment benefits," which was the term
- 12 the IRS used. I think it is clear that Congress must
- 13 have been looking at the IRS revenue rulings, again
- because there is simply nothing else that could have
- possibly given the IRS the impression that any of these
- 16 types of payments weren't wages to begin with.
- 17 And I think it's very important that the
- 18 Court not just look at the legislative history
- 19 piecemeal, but look at the entire historical backdrop if
- it decides to get into any of that at all. But we think
- 21 this case is very easily resolved on the plain text of
- 22 FICA, which clearly includes these payments. We don't
- even think there is a need to look at Section 3402(o),
- which is limited in effect to the income tax withholding
- 25 provisions and was enacted to solve a specific income

- 1 tax withholding-related problem and not to affect FICA's
- 2 basic definition of wages.
- JUSTICE GINSBURG: How about that we should
- 4 just ignore their revenue rulings, including the current
- one, and just deal with the statute? Is that what you
- 6 are suggesting?
- 7 MR. FEIGIN: Well, the revenue rulings
- 8 aren't directly at issue in this case, Your Honor,
- 9 because all the revenue rulings do is specify that
- 10 certain payments -- not the type of payments that are
- issued in this case -- are not wages. And nobody
- 12 contends that the revenue rulings have any effect or any
- 13 special bearing on this case, because this is a case
- 14 about payments that both the IRS in its revenue rulings
- and Congress under the plain text of FICA would classify
- 16 as wages.
- 17 CHIEF JUSTICE ROBERTS: Well, I think part
- of the -- the point is that the broad, capacious
- definition of "wages" at least doesn't seem as broad to
- 20 the IRS since they are carving things out, maybe not
- willy-nilly, but at least they don't seem that it's as
- 22 broad as you do -- they don't seem to think that it's as
- 23 broad as you do.
- MR. FEIGIN: Well, two points to that, Your
- 25 Honor. First, again, these exceptions first came into

- existence in the 1950s and 1960s, and I quite candidly
- don't think the IRS was as careful about fidelity to
- 3 text as a modern legal observer would be.
- 4 Second, if this Court were to believe that,
- 5 notwithstanding the fact that the IRS's revenue rulings
- 6 are indirectly at issue in this case for the reasons I
- 7 said to Justice Ginsburg, if this Court believes that it
- 8 cannot rule for the Government in this case on the
- 9 statutory question without concluding that the revenue
- 10 rulings are invalid, we still think the Court should
- 11 rule for the Government on the statutory question. We
- think the statutory text is clear, and that is the IRS's
- 13 position notwithstanding the revenue rulings.
- JUSTICE GINSBURG: And then what happens to
- 15 the State compensation schemes which the revenue rulings
- seem to have been trying to accommodate?
- MR. FEIGIN: So if this Court were to
- 18 conclude that the Government is correct on a -- as a
- 19 statutory matter, but we're to make clear that
- 20 revenue -- the current revenue ruling, Revenue Ruling
- 21 90-72 was invalid, that might have some effect on
- 22 individuals' eligibility for unemployment benefits under
- 23 State law in those States that incorporate the Federal
- definition of wages as part of the calculation for
- eligibility for State unemployment benefits.

1	If that creates any bad results, States will
2	be able to fix them, and I don't think that it should
3	preclude this Court from holding what the plain text of
4	FICA I think in this case requires.
5	Thank you.
6	CHIEF JUSTICE ROBERTS: Thank you, counsel.
7	The case is submitted.
8	(Whereupon, at 1:38 p.m., the case in the
9	above-entitled matter was submitted.)
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